IP 01-0788-C T/K Chalimoniuk v Interstate Brand [2]
Judge Tim A. Baker Signed on 5/21/02

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

CHALIMONIUK, KRZYSZTOF, Plaintiff, vs. INTERSTATE BRANDS CORPORATION, GORDON, TONIA, Defendants.	)	CAUSE NO. IP01-0788-C-T/G

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

KRZYSZTOF CHALIMONIUK	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CAUSE NO. IP01- 0788-C- T/K
	)	
INTERSTATE BRANDS CORPORATION and TONIA GORDON	)	
	)	
	)	
Defendants.	)	

ENTRY ON PLAINTIFF'S MOTION TO COMPEL DISCOVERY AND RELATED MOTIONS

I. Background

Plaintiff Kryzsztof Chalimoniuk seeks an order compelling Defendants Interstate Brands Corporation and Tonia Gordon to produce documents relating to his discrimination claim under the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et. seq. Specifically, Chalimoniuk claims Defendants violated the FMLA through a "non-uniform and discriminatory enforcement of IBC's attendance policy." [Pl. Br., p. 2].

The focus of the discovery dispute revolves around two separate sets of documents. First, in Request for Production No. 2, Chalimoniuk seeks "[a]ll documents related to 'last chance agreements' or other written exceptions to IBC's rules or policies offered to employees or former employees of IBC during the last five years." [Pl. Ex. B]. Second, in response to Chalimoniuk's Request for Production Nos. 1, 6, 8, & 12, asserting the attorney-client privilege and work-product doctrine, Defendants object and withhold handwritten drafts of a declaration by Defendant Gordon Bates stamped Nos.

0002-0005, and 0508-0511. [Defs.' Br., pp. 4-5].

In addition, Chalimoniuk moves the Court for a ruling on matters relating to Defendants' motion for summary judgment, and requests an opportunity to conduct additional discovery in the event the Court grants his motion to compel.

For the reasons set forth below, Plaintiff's motion to compel discovery is GRANTED IN PART and DENIED IN PART. Plaintiffs' premature motions are not ripe for review, and his motion to re-open discovery is DENIED, with the caveat that the Court will entertain a renewed motion after Chalimoniuk receives documents compelled for production in this entry.

II. Discussion

A. Standard on Motion to Compel Discovery

Federal Rule 37 addresses disputes in the discovery process, and is designed to be used by litigants to compel a response to a discovery request where none has been made, or where the response is so inadequate that it is tantamount to no response at all. See Centagon, Inc. v. Board of Directiors of 1212 Lake Shore Drive Consominium Ass'n, 2002 WL 356483, *4 (N.D. Ill. Mar. 5, 2002); see also Meyer v. Southern Pacific Lines, 199 F.R.D. 610, 611 (N.D. Ill. 2001) (same). The Court has broad discretion when deciding whether to compel discovery and may deny its production to protect a party from oppression or undue burden. See Chavez v. Daimlerchrysler Corp., _ F.R.D. _, 2002 WL 453242, *3 (S.D. Ind. Mar. 25, 2002) (recognizing that "district courts have broad discretion in matters related to discovery"); Gile v. United Airlines, Inc., 95 F.3d 492, 495-96 (7th Cir. 1996) ("The district court exercises significant discretion in ruling on a motion to compel."). The burden

is on the party resisting discovery to clarify and explain precisely why its objections are proper given the broad and liberal construction of the federal discovery rules. Zenith Electronics Corp. v. Exzec, Inc., 1998 WL 9181, *8 (N.D. Ill. 1998).

In ruling on a motion to compel, it is necessary for courts to apply the discovery standard set forth in Federal Rule of Civil Procedure 26(b). The rule, amended in December 2000, provides that "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party . . . Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Cook, Inc. v. Boston Scientific Corp., 2002 WL 406977, *1 (N.D. Ill. Mar. 15, 2002), quoting Fed. R. Civ. P. 26(b)(1). However, discovery may be limited if the Court determines "the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive." Patterson v. Avery Dennison Corp., 281 F.3d 676, 681 (7th Cir. 2002), quoting Fed. R. Civ. P. 26(b).

B. Last Chance Agreements

In Request No. 2, Chalimoniuk essentially requests all last chance agreements Defendant IBC entered into with its employees or the union for the last five years. IBC objected on the grounds that the request was both "irrelevant and not reasonably calculated to lead to the discovery of admissible evidence." [Defs.' Br., p. 2]. Further, Defendants claim that Chalimoniuk is not similarly situated to those who received last chance agreements because the union never requested that IBC offer Chalimoniuk one since he failed to follow the union's procedure to receive one, most notably by not

attending its executive board meeting scheduled for November 11, 2000. [Defs.' Br., pp. 7-8].

Applying the Rule 26(b) standard, the Court concludes that Chalimoniuk is entitled to discover information responsive to Request No. 2. The crux of Chalimoniuk's FMLA discrimination claim is that he was subject to disparate treatment in that IBC's attendance policy was not uniformly enforced because exceptions were made through granting last chance agreements. In fact, Gordon's deposition testimony reveals that exceptions to IBC's attendance policy were made through awarding last chance agreements. [Gordon Dep., pp. 203-04]. Although Chalimoniuk did not follow the union's procedure in obtaining a last chance agreement, discovery could reveal that others granted last chance agreements similarly did not

follow the union's procedure.[1] Finally, since Defendants state in their brief in support of their motion for summary judgment that Chalimoniuk cannot make out a prima facie case of discrimination (Defs.' Br. MSJ, pp. 27-29), it would prejudice Chalimoniuk if the Court would not allow him to conduct discovery that may assist him in rebutting Defendants' assertion. See, e.g., Wilds v. U.S. Postmaster General, 989 F. Supp. 178, 186 (D. Conn. 1997) (issue of fact existed as to whether last chance agreements were applied in a discriminatory manner).

Accordingly, with regard to Request No. 2, Chalimoniuk's motion to compel is GRANTED.

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[1] Even if discovery of these documents does not establish that others who failed to follow the union process received last chance agreements, the information discovered does not necessarily need to be admissible at trial but rather must fall within the scope of Rule 26(b). See, e.g., TIG Ins. Co. v. Giffin, Winning, Cohen & Bodewes, 2001 WL 969037, *1 (N.D. Ill. 2001), quoting Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978) (For the purpose of discovery, relevancy will be construed broadly to encompass "any matter that bears on, or that
reasonably could lead to other matter that could bear on, any issue that is or may be in the case.")

C. Drafts of Gordon Declaration

Responsive to Chalimoniuk's Request Nos. 1, 6, 8, & 12 are documents Bates stamped Nos. 002-005 and 508-511. These documents constitute rough drafts of a statement compiled by Gordon at the direction of IBC's counsel (002-005), and a typed draft of the statement from Gordon sent to IBC's counsel (508-511). [Defs.' Br., pp. 4-5]. Defendants object to the production of these documents asserting the attorney-client privilege and work-product doctrine. Id. at 9-10. The Court addresses these claims of privilege below.

1. Attorney-Client Privilege

The Seventh Circuit applies the general principles of attorney-client privilege as outlined by Wigmore: (1) Where legal advice of any kind is sought ,(2) from a professional legal adviser in a capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are at the client's instance permanently protected (7) from disclosure by the client or by the legal adviser (8) unless the protection is waived. E.E.O.C. v. International Profit Associates, Inc., 2002 WL 482541, slip op. (N.D. Ill. Mar. 27. 2002), citing United States v. White, 950 F.2d 426, 430 (7th Cir. 1991). As the parties seeking to establish the privilege, Defendants bear the burden of demonstrating that all of the requirements for invoking the attorney-client privilege are met. See Long v. Anderson University, 204 F.R.D. 125, 134 (S.D. Ind. 2001), citing United States v. Evans, 113 F.3d 1457, 1461 (7th Cir. 1997). The inquiry into whether documents are subject to a privilege is a highly fact-specific one, and "must be made on a document-by-document basis." Long, 204 F.R.D. at 134.

Chalimoniuk claims the attorney-client privilege does not apply, citing the inconsistent dates

reflected in the privilege logs proffered by Defendants related to these disputed documents. Indeed, the original privilege log reflects that document Bates stamped No. 004 is dated "8/11/01," and document No. 005 is dated "8/15/00." [Pl.'s Br., pp. 3-4]. As to document Nos. 002-003 and 0508-511, the original privilege log reflects no date. Id. However, when Defendants drafted and served a revised privilege log on February 11, 2002, the dates were changed to indicate the documents were created in "02/01." [Pl.'s Ex. F]. This is significant, says Chalimoniuk, because the August dates correspond close in time to his release from Fairbanks Hospital, the meeting in which he was terminated, and an unemployment compensation issue he raised, all approximately six months before his attorney sent a letter threatening litigation. Therefore, the documents were not created at the direction of counsel in anticipation of litigation. [Pl.'s Br., p. 4].

Defendants claim the dates on the original privilege log were entered in error in that the dates referenced therein were actually the dates contained in the documents themselves. [Defs.' Br., p. 5]. Other than his own speculation, Chalimoniuk fails to rebut Defendants' explanation. In any event, a mere mistake by counsel or a company representative in a privilege log does not necessarily amount to a waiver of a privilege. See, e.g., Simon Property Group L.P. v. mySimon, Inc., 194 F.R.D. 644, 648 (S.D. Ind. 2000) (court adopted the so-called "skeptical balancing" approach in which the court considers all the relevant circumstances to determine whether an inadvertent disclosure constitutes a waiver). See also U.S. ex rel. Bagley v. TRW, Inc., 204 F.R.D. 170, 176 (C.D. Cal. 2001) (discussing the three approaches adopted by federal courts in addressing this issue).

In this case, Defendants have provided sufficient evidence that Gordon's statements to counsel are protected by the attorney-client privilege. For instance, on February 15, 2001, Chalimoniuk's

counsel sent a letter to IBC and Gordon putting them "on notice" of Chalimoniuk's potential claims under the FMLA. [Gordon Dec., Ex. A]. Thereafter, Cathy Sites, IBC's Human Resource Manager, and Gordon spoke with IBC's counsel regarding the February 15th letter and the threatened litigation. IBC's counsel directed Gordon to draft a statement of events leading up to the threatened litigation. This demonstrates that Defendants were seeking advice of counsel in anticipation of litigation after receiving the February 15th letter. See Rehling v. City of Chicago, 207 F.3d 1009, 1019 (7th Cir. 2000) (the attorney-client privilege only protects a client's confidential communications made to his lawyer for the purpose of obtaining legal advice from a professional legal advisor acting in his capacity as such). These documents contain the attorney's and client's mental impressions, strategies, and either solicit or provide legal advice. See, e.g., Lexecon, Inc. v. Milberg Weiss Bershad Specthrie & Lerach, 1993 WL 179789, *7 (N.D. Ill. 1993) ("Attorney-client privilege claims would protect only documents, from client to lawyer or from lawyer to lawyer or from lawyer to client, whose production would reveal the content of privileged communications from clients made for the purpose of securing legal advice or services.").[2]

[2] Chalimoniuk cites to this Court's decision in Long v. Anderson University, 204 F.R.D. 125, 134 (S.D. Ind. 2001) for the proposition that he is entitled to Gordon's draft statements. However, Chalimoniuk's case can be distinguished in that the statement compelled for production in Long came from an individual whose relationship with the Defendant was unclear. Here, the statements came from Gordon, a party defendant.

2. Work-Product Doctrine

The work-product doctrine, announced in Hickman v. Taylor, 329 U.S. 495 (1947), protects otherwise discoverable documents and tangibles, and was subsequently codified as Rule 26(b)(3) of the Federal Rules of Civil Procedure. E.E.O.C. v. International Profit Associates, Inc., 2002 WL 482541, slip op. (N.D. Ill. Mar. 27, 2002). The work-product doctrine "is intended to prevent a litigant from taking a free ride on the research and thinking of his opponent's lawyer and to avoid the resulting deterrent to a lawyer's committing his thoughts to paper." United States v. Frederick, 182 F.3d 496, 500 (7th Cir. 1999). It is similar to the attorney-client privilege, in that it provides an exception to the usually liberal discovery rules. See Beneficial Franchise Co., Inc. v. Bank One, N.A., 2001 WL 492479, *2 (N.D. Ill. 2001). The work-product doctrine protects from disclosure documents and tangible things otherwise discoverable that were "prepared in anticipation of litigation." Fed. R. Civ. P. 26(b)(3); Trustmark Ins. Co. v. General & Cologne Life Re of America, 2000 WL 1898518, *3 (N.D. Ill. 2000). See also Logan v. Commercial Union Ins. Co., 96 F.3d 971, 976 (7th Cir. 1996) (to claim protection of the doctrine, a party must demonstrate that the materials in question would otherwise be discoverable and were prepared in anticipation of litigation); Caremark, Inc., v. Affiliated Computer Services, Inc., 195 F.R.D. 610, 614 (N.D. Ill. 2000) (threshold determination is "whether the documents sought to be protected were prepared in anticipation of litigation or for trial").

This qualified privilege can be rebutted, however, "if the party seeking production demonstrates both a substantial need for the materials and that it would suffer undue hardship in procuring the requested information some other way." Logan, 96 F.3d at 976. The burden is on the discovery opponent to establish that the work-product doctrine immunizes the documents at issue from discovery.

McNally Tunneling Corp. v. City of Evanston, 2002 WL 59115, *2 (N.D. Ill. Jan. 14, 2002), citing Holmes v. Pension Plan of Bethlehem Steel Corp., 213 F.3d 124, 138 (3rd Cir. 2000).

Chalimoniuk asserts that the work-product doctrine does not protect the documents in question because they were prepared in the "normal course of business" rather than "in anticipation of litigation" as required to establish the privilege. [Pl. Br., p. 7]. However, the Court concludes that Gordon's statements fall within the work-product doctrine for similar reasons to why they are protected by the attorney-client privilege. Counsel's threats of litigation in the February 15th letter placed Defendants on notice that a lawsuit by Chalimoniuk was imminent. Only after these threats did IBC's counsel request that Gordon compile a statement of events to prepare for impending litigation. See. e.g., Goodyear Tire and Rubber Co. v. Chiles Power Supply, Inc., 190 F.R.D. 532 (S.D. Ind. 1999) (witness statements compiled by insurer after being notified of imminent lawsuits against customer were protected by work-product doctrine); E.E.O.C. v. International Profit Associates, Inc., 2002 WL 482541, slip op. (N.D. Ill. Mar. 27. 2002) (to qualify as work product, the material must come into existence because of the prospect of litigation or some articulable claim is likely to lead to litigation). See also 8 Wright & Miller, Federal Practice and Procedure § 2024, at 343 (2d ed. 1994) ("[T]he test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.").

Chalimoniuk may still discover these statements, however, if he demonstrates a "substantial need" for the documents and that he would suffer "undue hardship" if he was required to obtain the information in another manner. Caremark, Inc. v. Affiliated Computer Services, Inc., 195 F.R.D. 610,

614 (N.D. Ill. 2000). This burden is difficult to meet and is satisfied only in "rare situations, such as those involving witness unavailability." Trustmark Insurance Co. v. General & Cologne Life Re of America, 2000 WL 1898518, *3 (N.D. Ill. 2000). In his February 2002 deposition, Chalimoniuk was given an opportunity to explore, and Gordon was readily available to answer, any non-privileged questions through live testimony. Gordon's testimony, which was given under oath, is a more reliable source of information than preliminary drafts of a statement requested by her counsel. Chalimoniuk fails to articulate a substantial need for the Gordon statements or that he would suffer an undue hardship if he does not obtain these statements. See, e.g., Logan, 96 F.3d at 976 (in addition to showing "substantial need," it is also necessary to show an "undue hardship" if required to obtain the information in another manner).

Accordingly, with regard to documents Bates stamped Nos. 002-005 and 0508-511, Chalimoniuk's motion to compel is DENIED.

D. Related Motions

In his reply brief, Chalimoniuk also moves the Court to: (1) strike from Defendants' summary judgment briefs all allegations related to last chance agreements; (2) declare that Chalimoniuk is entitled to the presumption that the last chance agreements constitute a non-uniform and discriminatory enforcement of IBC's attendance policy; and (3) permit Chalimoniuk an opportunity to conduct additional discovery after receiving documents responsive to Request No. 2. As to items 1 and 2, the Court declines to make a ruling at this time since these items are not ripe for review. These issues are more properly addressed by the Court in its entry on the parties' cross motions for summary judgment.

As to item 3, after Chalimoniuk receives documents responsive to Request No. 2, he may seek leave to re-open discovery if necessary. Due to the stage of this litigation, however, such motion will only be granted if good cause is shown.

III. Conclusion

For the reasons set forth in this entry:

1. Plaintiff's motion to compel discovery is GRANTED IN PART and DENIED IN PART. Defendants are hereby ORDERED to produce all documents responsive to Plaintiff's Request for Production No. 2, including all last chance agreements awarded to IBC employees in the last five years, within 15 days of the date of this entry;

2. Plaintiff's motion to re-open discovery is DENIED. However, after Plaintiff receives documents responsive to Request No. 2, he may seek leave to re-open discovery if necessary. Such motion will only be granted if good cause is shown; and

3. The Court declines for ripeness reasons to rule on: (1) Plaintiff's motion to strike from Defendants' summary judgment briefing all allegations related to last chance agreements; and (2) Plaintiff's motion to declare that Chalimoniuk is entitled to the presumption that the last chance agreements constitute a non-uniform and discriminatory enforcement of IBC's attendance policy.

So ordered.

DATED this _____ day of May, 2002.

_____

Tim A. Baker
United States Magistrate Judge
Southern District of Indiana

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